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The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union of Hawaii is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the civil rights of prisoners. The ACLU thus has a particular interest in assuring that prisoners are not arbitrarily punished by solitary confinement.

The parties have consented to the filing of this brief as indicated by their letters of consent filed with the Clerk of the Court.

STATEMENT OF THE CASE

Respondent David Conner has been incarcerated in the Halawa Correctional Facility since September 1985. On August 25, 1987, Conner was charged with "physical interference or obstacle resulting in the obstruction, hinderance, or impairment of the performance of a correctional function of a public servant." Under the regulations of the Hawaii Department of Corrections this is a "high misconduct" offense. Pet. App. A65.[1] The Respondent denied guilt and requested that he be allowed to call staff witnesses to his disciplinary hearing; his request was denied. On August 28, 1987, he was found guilty and was sentenced to thirty days disciplinary segregation on the high misconduct charge. Pet. App. A66.

[1] Respondent was charged with additional "low moderate" offenses. All charges stemmed from one strip search by a correctional officer. Pet. App. A66.

Conner filed a federal civil rights challenge to the disciplinary proceedings.[2] The district court granted summary judgment against Respondent on this claim. On appeal, the Ninth Circuit held that Hawaii disciplinary regulations conferred upon Respondent a liberty interest in not being arbitrarily placed in disciplinary segregation. The court therefore held that the lower court had improperly granted summary judgment and it remanded for a determination of whether, under Wolff v. McDonald, 418 U.S. 539 (1974), the denial of Respondent's request for witnesses violated his rights under the Due Process Clause. Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1993).

[2] After Respondent had completed the time in segregation as a result of the disciplinary finding, and while the action was pending in the district court, the Deputy Administrator of the facility ordered the finding of high misconduct expunged.

SUMMARY OF ARGUMENT

Petitioner urges this Court to adopt a rule that would permit a prisoner to be judged guilty of serious misconduct and punished by lengthy solitary confinement, without any due process safeguards against wholly arbitrary decisions. This position, if adopted by the Court, would represent a major departure from its previous decisions, and would unsettle a large body of precedent in the lower courts based on those decisions.

In Wolff v. McDonnell, 418 U.S. 539 (1974), Cox v. Cook, 420 U.S. 734 (per curiam), reh'g denied, 421 U.S. 955 (1975), and Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), the Court stated that prisoners have rights stemming from the Due Process Clause not to be arbitrarily subjected to deter-minations of major misconduct and punishment with solitary confinement. The Court's later decisions in Vitek v. Jones, 445 U.S. 480, (1980), and Hewitt v. Helms, 459 U.S. 460 (1983), underscore the need for due process

protections when prison officials take action, such as punitive segregation, which results in a major change in the conditions of confinement, and involves stigmatization and possible collateral consequences such as parole denial.

Moreover, in its decisions in Wolff, Vitek, Hewitt, Olim v. Wakinekona, 461 U.S. 238 (1983), and Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989), the Court made clear that state law, by limiting prison officials' discretion to curtail a prisoner's liberty, may create a further liberty interest giving rise to due process rights. Regulations governing the Department of Corrections of the State of Hawaii dictate that determinations of serious misconduct punishable by disciplinary segregation may be made only upon evidence of guilt of a specific rule violation. The great majority of the lower courts that have addressed the issue, including the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits, have reached the conclusion that, in these circumstances,

prisoners have a reasonable expectation, giving rise to a liberty interest, that they will not be found guilty of and punished for serious misconduct without due process safeguards.

ARGUMENT

I. THIS COURT HAS ALREADY RECOGNIZED THAT STATE PRISONERS HAVE A LIBERTY INTEREST IN NOT BEING ARBITRARILY PUNISHED BY PLACEMENT IN SOLITARY CONFINEMENT

Petitioner argues that "[t]here simply is no support in precedent for the recognition of 'liberty interests' with respect to an assignment to disciplinary segregation under any circumstances when such an assignment carries with it no loss of good time credits, and no necessary impact on parole." (Pet'r Br. at 19-20.) If her position were adopted, it would mean that a prisoner who obeys all prison rules could be found guilty of major misconduct and punished by lengthy solitary confinement, without any due process safeguards.[3]

Petitioner's claim that precedent is on her side is inaccurate. Her position, if adopted by the Court, would represent a significant departure from the decisions of this Court and of the

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[3] According to Petitioner, this should be the case even if state law provides, as does that of Hawaii, that misconduct in prison may be grounds for parole denial.

lower courts, which have long recognized that prisoners have a liberty interest in not being subjected to arbitrary punishment by way of solitary confinement.

In Wolff v. McDonnell, 418 U.S. 539 (1974), a Nebraska state prisoner claimed that prison disciplinary proceedings against him, which had resulted in the loss of statutory good-time credits, violated the Due Process Clause. Nebraska's statute provided that in cases of flagrant or serious misconduct prison officials "may order" that statutory good-time credits "be forfeited or withheld and also that the person be confined in a disciplinary cell." Id. at 546-47.

The Court explicitly "reject[ed] the assertion of the State" that "the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment. Id. at 556-557. The Court concluded that even though the Constitution does not

guarantee good-time credit for satisfactory behavior while in prison, nevertheless,

> the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In Haines v. Kerner, [404 U.S. 519 1972) (per curiam)], the state prisoner asserted a "denial of due process in the steps leading to [disciplinary] confinement." (citation omitted). We reversed the dismissal of the § 1983 complaint for failure to state a claim. In Preiser v. Rodriguez, [411 U.S. 475 (1973)], the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding.

Id. at 557. By illustrating its point with a disciplinary confinement case (Haines) as well as a good-time forfeiture case (Preiser), the Court indicated that its holding applied to both situations.

The Court went on to explain why a prisoner's interest in not being arbitrarily punished

by solitary confinement, like loss of good-time credits, does have "real substance" implicating due process rights. Stating that the same procedures that were appropriate for disciplinary proceedings involving the possibility of loss of good-time were appropriate for disciplinary proceedings involving solitary confinement, the Court reasoned as follows:

> it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.

Id. at 571 n.19.

A year later, in Cox v. Cook, 420 U.S. 734 (per curiam), reh'g denied, 421 U.S. 955 (1975), the Court reiterated the proposition that prisoners have a liberty interest in disciplinary determinations resulting in solitary confinement, without linking that interest to a

loss of good-time credits. The Court held that an inmate who claimed he had been disciplined without notice of the misconduct charged or an opportunity to meet the charges could not rely on the rule announced in Wolff since the disciplinary action pre-dated Wolff, and Wolff had expressly held that the due process requirements it set forth for prison disciplinary cases were not to be applied retroactively. However in its per curiam opinion the Court stated, "[i]n Wolff v. McDonnell, (citation omitted), we held that a state prisoner was entitled under the Due Process Clause of the Fourteenth Amendment to notice and some kind of hearing in connection with discipline determinations involving serious misconduct." Cox, 420 U.S. at 736.

Five years later, in Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), in which a prisoner challenged placement in segregation prior to a disciplinary hearing, the Court again restated that disciplinary segregation implicates a liberty interest requiring due process. Without

any discussion of whether under state law disciplinary segregation would require loss of good-time credits or affect parole, the Court remanded for a determination of whether the segregation violated the prisoner's due process rights, stating, "the Court of Appeals correctly noted that the Fourteenth Amendment affords a prisoner certain minimum procedural safeguards before disciplinary action may be taken against him." Id. at 9.

In the case now before the Court, as in Wolff, the State has limited prison officials' discretion to impose punitive segregation to instances where serious misconduct has been charged and proved. Thus in this case, as in Wolff, the liberty interest arising directly under the Due Process Clause merges with the liberty interest created by the State. Indeed, it is difficult to conceive of any prison disciplinary system that would not limit serious punishment to cases where misconduct has been proved, thereby implicating due process rights.

See Part II infra. For this reason, no sharp distinction exists in the context of punitive segregation between liberty interests that arise directly under the Due Process Clause and those that arise under State law.

In decisions subsequent to Wolff, the Court articulated the principle that distinguishes disciplinary confinement, which always requires due process protections, from many other prison administrative decisions, in which due process protections are required only if the State has created a liberty interest. That distinction, as set forth below, turns on whether the curtailment of the liberty at issue is within the range of conditions to which the sentence itself subjects the prisoner. Under this analysis, disciplinary confinement is not within the range of conditions entailed by the sentence to prison itself, because it is "normally imposed only when it is claimed and proved that there has been a major act of misconduct." Wolff, 418 U.S. at 571 n.19.

In Meachum v. Fano, 427 U.S. 215, 225 (1976), the Court held that the Due Process Clause does not require State prison officials to conduct a factfinding hearing before transferring an inmate to a more restrictive prison, because confinement in any of the State's prisons is "within the normal limits or range of custody which the conviction has authorized the State to impose." The prisoner's misconduct might have been a basis for the transfer; but since a prisoner has no right to be confined in one prison rather than another, there was no right to "procedures that might be required by the Due Process Clause in other circumstances" to prove that misconduct. Id. at 228.

In Vitek v. Jones, 445 U.S. 480, 487-88 (1980), the Court held that transfer of a prisoner to a mental hospital did require due process protections.[4] The Court found that,

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[4] The Court held that the prisoner's liberty interest stemmed directly from the Due Process Clause in avoiding the transfer, and that a liberty interest was created by state law as well. The statute authorized a prisoner's transfer to a mental hospital if a designated physician or psychologist found the prisoner to be suffering from a mental disease or defect that could not be treated in prison. Id.

although a sentence to prison extinguished a prisoner's right to freedom from confinement, the conditions or degree of confinement nonetheless had to be within the range of conditions to which the prison sentence itself subjected the prisoner. Unlike transfer to another prison, confinement in a mental hospital is "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." so it is not within the range of conditions authorized by the sentence. Id. at 493. The Court noted the adverse social consequences and stigmatization resulting from mental hospital commitment, as well as the fact that transfer exposed the prisoner to behavior modification programs representing a major change in the conditions of confinement. Id. at 492.[5]

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[5] Vitek specifically notes the language in Wolff applying due process protections to the imposition of solitary confinement because such punishment represents a major change in condi-

In Hewitt v. Helms, 459 U.S. 460 (1983), the Court distinguished for due process purposes between administrative segregation and punitive segregation in holding that transfer of a prisoner to more restrictive confinement for nonpunitive reasons does not require the full panoply of Wolff protections. The Court noted that confinement in administrative segregation could be imposed not only pending investigation of charges but also to protect a prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or to hold a prisoner awaiting transfer or classification. Id. at 468. Accordingly, the Court concluded, "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." Id.

Furthermore, "[u]nlike disciplinary confinement the stigma of wrongdoing or misconduct

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tions of confinement and is normally imposed only after proof of misconduct. Id. at 488.

does not attach to administrative segregation under [state law]." Id. at 473. Additionally, "there is no indication that administrative segregation will have any significant effect on parole opportunities." Id. In contrast, disciplinary determinations "are certainly likely to be considered by the state parole authorities in making parole decisions" and may have other serious "collateral consequences" in addition to the disciplinary sentence. Wolff, 418 U.S. at 565.

That is the case in Hawaii, where parole may be denied when the Authority finds that the "inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record" or that the inmate "has a pending prison misconduct." Haw. Admin. R. § 23-700-33 (b) and (e). Petitioner fails to consider these consequences when she characterizes the punishment of solitary confinement as merely the loss of an insubstantial and trivial "privilege," namely, "the 'opportunity' to

socialize face-to-face with fellow maximum security convicts in a 'general population' module." (Pet'r Br. at 28-29.)[6]

Hewitt strongly supports the conclusion that disciplinary proceedings for major misconduct which may result in punitive segregation implicate due process rights under Wolff. As the Court recognized, the distinction between administrative and punitive segregation is a substantive one, even though the conditions of confinement may be virtually the same. Unlike administrative segregation, punishment for serious misconduct during incarceration is not "within the terms of confinement ordinarily

[6] Petitioner also trivializes the potential psychological consequences of solitary confinement, which have been documented by a number of researchers. See, e.g., Benjamin & Lux, Solitary Confinement as Psychological Punishment, 13 Cal. W.L. Rev. 265 (1977); Grassian, Psychopathological Effects of Solitary Confinement, 140 Am. J. Psychiatry 1450 (1983); Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 2 New Eng. J. Prison L. 27 (1975); Grassian & Friedman, Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement, 8 Int'l J.L. & Psychiatry 49 (1986).

contemplated by a prison sentence," and prisoners who abide by prison rules surely do not "reasonably anticipate receiving [disciplinary segregation] at some point in their incarceration." To the contrary: the maintenance of security and order in a prison is enhanced when prisoners have a reasonable expectation that if they obey prison rules and do not engage in misconduct, they will not arbitrarily be subjected to a determination of, or punishment for, serious misconduct. See Section III, infra.

II. STATE REGULATIONS THAT REQUIRE A FINDING BASED ON EVIDENCE OF SERIOUS MISCONDUCT AS A PREREQUISITE TO A DETERMINATION OF GUILT AND PUNISHMENT BY SOLITARY CONFINEMENT CREATE A LIBERTY INTEREST

Petitioner claims that the ruling in this case "launch[es] the lower federal courts on the mission of policing every assignment to disciplinary segregation in Hawaii's prisons[.]" (Pet'r Br. at 25.) She argues that a ruling that arbitrary punishment by way of solitary confinement could ever give rise to a federally protected liberty interest "qualitatively

expands" federal control over state prison management, and represents a radical departure from Supreme Court precedent. (Pet'r Br. at 24-27.) That is not the case. The Ninth Circuit's finding of a state-created liberty interest is entirely consistent with every one of this Court's decisions involving state-created liberty interests in prison cases. Furthermore, the majority of the circuit courts that have considered the question have concluded that disciplinary rules in themselves create a liberty interest, because the requirement of a finding of guilt based on evidence acts as a substantive limitation on the official's exercise of discretion.

A. The Ninth Circuit's Decision Is Entirely Consistent with Existing Precedent

The Ninth Circuit's opinion in this case, noting that "[t]he fourteenth amendment protects liberty interests arising from the Due Process Clause or created by state law," Conner v. Sakai, 15 F.3d 1463, 1466 (9th Cir. 1993), addressed the issue of whether a liberty interest had been created by a Hawaii regulation

which provides:

> Upon completion of the [disciplinary] hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:
>
> (1) The inmate or ward admits the violation or pleads guilty.
>
> (2) The charge is supported by substantial evidence.

Haw. Admin. R. § 17-201-18(b).

Applying the analysis in Kentucky Dep't.of Corrections v. Thompson, 490 U.S. 454 (1989), the court of appeals sought to determine whether the regulations established "substantive predicates," that is, particularized standards or criteria to guide the State's decisionmakers, and next, whether the state requires, in sufficiently mandatory language, that if the substantive predicates are met, a particular outcome must follow. Conner, 15 F.3d at 1466. The court of appeals concluded that Hawaii had

created a liberty interest in not being confined to disciplinary segregation, basing this conclusion on a finding that the applicable regulations provide that

> the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt. If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome--freedom from disciplinary segregation--must follow. § 17-201-18(b).

Id.

1. Supreme Court Precedent

The Ninth Circuit's ruling is consistent with every one of this Court's decisions involving state-created liberty interests in prison cases. These cases hold that "a State creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983). The Court's "method of inquiry in these cases always has been to examine closely the language of the relevant statues and regulations." Thompson, 490 U.S. at 461. "Neither the drafting of regulations nor their interpretation can be reduced to an exact science." Id. at 462. The State may create a liberty interest "in a number of ways," the "most common" of which is "by establishing 'substantive predicates' to govern official decision making," and, further, "by mandating the outcome to be reached upon a finding that the relevant criteria have been met." Id. (quoting Hewitt, 459 U.S. at 472).

Petitioner claims that Thompson created a new "two-way mandatory outcome test." (Pet'r Br. at 38-39.) This test would find a liberty interest created by state statute or regulations only if they force officials to deprive an inmate of the liberty in question whenever the substantive predicates are met, in addition to preventing the liberty deprivation when the subjective predicates are not met. Thus, according to Petitioner, Hawaii's regulations do not create a liberty interest because they do not require officials to assign the prisoner to

punitive segregation upon a finding of serious misconduct. Id.

This interpretation of Thompson is logically unpersuasive. It wrests isolated phrases from the decision out of context and puts them at war with the thrust of the decision as a whole, as well as with the Court's reasoning and conclusions in Wolff, Vitek, Olim, and Hewitt, upon which the Thompson decision is explicitly grounded.

In Thompson, the Court concluded that regulations setting forth the categories of prisoners who might be excluded from visitation did not give inmates a liberty interest in receiving visitors because the regulations were not worded in such a way that an inmate could reasonably expect to enforce them against prison officials. The decision reiterates the holding in Olim, 461 U.S. at 249, that "a State creates a protected liberty interest by placing substantive limitations on official discretion." Thompson, 490 U.S. at 462. The Thompson decision

points out that the regulations in question "begin[] with the caveat that 'administrative staff reserves the right to allow or disallow visits[.]'" 490 U.S. at 464. The decision goes on to observe that the regulation provided that visitors "may" be excluded if they fall within one of the described categories, "but they need not be." Id. It further observes that under the regulation visitors need not fall within one of the described categories in order to be excluded. Id. The opinion concludes that the regulation lacked the requisite mandatory language to create a liberty interest. Id. at 465.

Petitioner seizes upon the Court's observation that under the regulation "[v]istors may be excluded if they fall within one of the described categories...but they need not be," id. at 464, and asserts that the regulation's failure to require officials to exclude visitors who fall within a described category was the basis for the Court's conclusion that no liberty interest had been created. That fact was not,

however, the touchstone for the decision. The Court's reasoning was not that in order to create a liberty interest a regulation must require prison officials to exclude visitors in the enumerated categories, but rather that

> [t]he overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against prison officials.

Thompson, 490 U.S. at 464-465 (emphasis added).[7]

Petitioner's interpretation of Thompson, that to create a liberty interest, regulations must rob prison officials of the discretion to forego depriving inmates of the liberty in

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[7] "To the inmate the question of whether the official is forced to assign him to restrictive custody (or to refuse entry to his visitor) when a substantive predicate is met is irrelevant. The mandatory element of a regulation which an inmate would expect to enforce is the element which forces the official to keep the inmate in general population (or to admit the visitor)." Layton v. Beyer, 953 F.2d 839, 849 n. 16 (3d Cir. 1992) (rejecting the "two-way mandatory outcome" interpretation of Thompson).

question whenever substantive predicates are met, would put Thompson directly at odds with Hewitt, a decision upon which the Thompson Court explicitly relied. Hewitt indicates that to create a liberty interest, state law must bar prison officials from depriving the inmate of the liberty, unless the substantive predicates are met:

> Clearly, the relevant "mandatory language" need not rob the administrator of discretion to forego the deprivation of the prisoner's liberty any time certain criteria are met. Instead, the language must force the administrator to refrain from imposing the restriction on the inmate in the absence of specified criteria being met.

Layton v. Beyer, 953 F.2d 839, 849 (3d Cir. 1992) (rejecting "two-way mandatory-outcome" interpretation of Thompson).[8]

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[8] See also Mendoza v. Blodgett, 960 F.2d 1425, 1429 (9th Cir. 1992), cert. denied, 113 S. Ct. 1005, 1027 (1993) (prison's "dry cell watch" regulation created a liberty interest, even though superintendent had discretion not to place prisoner on dry cell watch when there was reasonable suspicion that the prisoner had secreted contraband); Smith v. Shettle, 946 F.2d 1250, 1253 (7th Cir. 1991) (for purposes of creating a liberty interest, it makes no difference that the statute does not require but only permits segregation; "most statutes leave dis-

In Hewitt, the Court held that the State had created a liberty interest in not being arbitrarily confined to administrative segregation because

> the Commonwealth has gone beyond simple procedural guidelines. It has used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed, (citation omitted) and that administrative segregation will not occur absent specified substantive predicates--viz., "the need for control," or "the threat of a serious disturbance." .... [O]n balance we are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.

Hewitt, 459 U.S. at 471-72.

In Hewitt, as here, the language creating the substantive predicate permitted (but did not require) officials to place certain restrictions on inmates under certain circumstances (an inmate who has allegedly committed misconduct "may" be placed in administrative custody based upon the administrator's assessment of the

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cretion to the persons charged with their enforcement rather than commanding them to enforce the statute to the hilt") (dicta).

situation and the need for control; an inmate "may" be temporarily confined in administrative custody where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. Hewitt, 459 U.S. at 471 n.6.) Prison officials thus retained discretion whether or not to place an inmate in administrative segregation under circumstances permitting the segregation. Yet the Court held that these substantive predicates, coupled with language mandating the procedures to be followed if the substantive predicates were met, "demand[ed]" the conclusion that the State had created a protected liberty interest. Hewitt, 459 U.S. at 472. See also Vitek, 445 U.S. at 480 (statute providing that if a designated physician finds that a prisoner suffers from a mental disease or defect that cannot be properly treated in prison, prison officials "may" transfer prisoner to a mental hospital implicates right to due process hearing); Wolff, 418 U.S. at 546-547 (statute pro-

vided that in cases of serious or flagrant misconduct, the chief executive officer "may" order loss of statutory good-time credit or disciplinary confinement, but did not require that outcome; nevertheless, due process rights implicated).

2. Precedent from Other Circuits

The Ninth Circuit's decision is in harmony with previous decisions by the Second, Third, Fifth, Seventh and Eighth Circuits, holding that disciplinary rules in themselves create a liberty interest because the requirement of a finding of guilt based on evidence places a substantive limit on the official's exercise of discretion. The Second Circuit has reasoned as follows:

> When restrictive confinement within a prison is expressly imposed as a disciplinary sanction . . . there will ordinarily be no doubt that the confinement impaired a liberty interest protected by state law and that the due process procedures specified in Wolff are therefore required. The state statutes and regulations authorizing restrictive confinement as punishment upon a finding of a disciplinary infraction will invariably provide sufficient limitation on

> the discretion of prison officials to create a liberty interest.

Sher v. Coughlin, 739 F.2d 77, 81 (2d Cir. 1984) (footnote omitted) (where transfer of prisoner to a special housing unit involving restricted confinement had an administrative, nonpunitive basis, the transfer did not entitle the prisoner to procedural due process). Likewise, the Fifth Circuit has found that disciplinary rules necessarily create liberty interests because they condition the officials' discretion to punish on a finding of guilt. Green v. Ferrell, 801 F.2d 765, 769 (5th Cir. 1986); Gibbs v. King, 779 F.2d 1040 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). The Seventh Circuit has reached the same conclusion, see Gilbert v. Frazier, 931 F.2d 1581, 1582 (7th Cir. 1991) (prisoner "could not be placed in disciplinary confinement without a finding that he had violated a definite standard[]"); cf. Castaneda v. Henman, 914 F.2d 981 (7th Cir. 1990), cert. denied, 498 U.S. 1124 (1991) (where no substantive criteria exist to circumscribe a warden's discretion to designate

a transfer as one done for security rather than disciplinary reasons, a hearing is not constitutionally required). The Third and Eighth Circuits have also reached this conclusion. See Todaro v. Bowman, 872 F.2d 43 (3d Cir. 1989) (regulation barring punishment unless inmate broke disciplinary rules, combined with mandatory procedural regulations, created a liberty interest protected by due process): Pletka v. Nix, 957 F.2d 1480, 1484 (8th Cir.), cert. denied, 113 S. Ct. 163 (1992) (prisoners have a liberty interest in not being placed in special conditions of confinement for disciplinary reasons). But see Dudley v. Stewart, 724 F.2d 1493, 1495-96 (11th Cir. 1984) (disciplinary rules do not create liberty interest).

A few cases have held that prisoners placed in segregation are not entitled to the full procedurals rights set down in Wolff. See Hensley v. Wilson, 850 F.2d 269, 283 (6th Cir. 1988) (where inmate did not lose any good time as result of disciplinary charges, Hewitt rather

than Wolff is the appropriate standard for determining his due process rights); Crosby-Bey v. District of Columbia, 786 F.2d 1182, 1185 (D.C.Cir. 1986) (officials replaced inmate's administrative with disciplinary segregation; procedures followed, which closely approximated Wolff requirements, constituted due process). Even these decisions, however, assume that placement in segregation implicates a liberty interest protected by due process.[9]

3. Hawaii's Regulation in Fact Meets a "Two-Way Mandatory Outcome" Test

Even if Petitioner were correct that Thompson created a "two-way mandatory outcome test," the Hawaii regulation at issue in this case

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[9] We believe that Hensley and Crosby-Bey are wrongly decided in that Wolff should apply to any serious punishment based on a factual finding that a prisoner has violated a rule. See Hewitt, 459 U.S. at 478 (distinguishing "subjective" and "intuitive" judgments underlying administrative segregation placements from questions for which "trial-type procedural safeguards" are appropriate). However, the question of what process is due is not within the scope of the question on which the Court granted certiorari and is therefore not before the Court.

would meet that test. The regulation requires the committee to find guilt if there is a confession or "substantial evidence" of a rule infraction, Haw. Admin. R. § 17-201-18(b), and precludes a finding of guilt unless there is a determination, based on more than the prisoner's silence in face of the charges, that he committed the misconduct. Id. See also Haw. Admin. R. § 17-201-17(b)(2) ("A plea of not guilty necessitates the consideration of evidence against the inmate or ward.")

B. Whether or Not State Law Requires Substantial Evidence of Guilt Is Irrelevant

Petitioner argues that the court of appeals' conclusion was based on a faulty reading of the regulations. (Pet'r Br. 40-41.) She points to the Court of Appeals' finding that under the provision in question, Haw. Admin. R. § 17-201-18(b), "the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt," and

asserts that "the rule simply provides no such thing." (Pet'r Br. at 40-41.) According to Petitioner, the provisions that a finding of guilt "shall be made where [the inmate] admits the violation or pleads guilty" or "the charge is supported by substantial evidence" leave the committee free to make a finding of guilt and to order punitive segregation "on the basis of any proof at all, so long as the disciplinary action is 'based on more than mere silence.'" (Pet'r Br. at 41.) This is so, according to Petitioner, because the rules "make no precise specification of when the adjustment committee 'shall' make a 'finding of innocence'; indeed the regulations make no reference to such sorts of findings at all." (Pet'r Br. at 11.)

This is an implausible reading of the regulations. Indeed, the Hawaiian Attorney General has himself interpreted the regulation in question just as the Ninth Circuit interpreted it. See infra section II.B.1. Furthermore, even if Petitioner is correct that the regulations do

not in fact mandate a "substantial evidence" burden of proof, the "substantive predicate" for a liberty interest is not the quantum of proof required, but the requirement of a finding of guilt based on evidence. That is the "substantive predicate" which limits official discretion, by dictating that a prisoner not be determined guilty of serious misconduct, or punished therefor, absent such a determination. See infra section II.B.2.

1. Hawaii's Attorney General Interpreted the Regulation Just As the Ninth Circuit Interpreted It

In petitioning this Court for review of the Ninth Circuit decision, the Attorney General of Hawaii framed the question presented as whether an inmate has a liberty interest in avoiding disciplinary segregation "solely because state prison disciplinary rules require a disciplinary committee to find substantial evidence of a rule infraction before deciding whether and to what extent the inmate should be segregated[.]" (Cert. Pet. at i) (emphasis added). Thereafter,

in her Brief on the merits, Petitioner suggested an interpretation of the regulation not made in the proceedings below and inconsistent with the characterization of the regulation adopted in Petitioner's initial brief. Continuing to concede that "the rules require the committee to find 'substantial evidence' before deciding, under the compulsion of the adjustment process, whether and to what extent to order an inmate segregated," (Pet'r Br. at 40-41), Petitioner now asserts that nevertheless "the rules permit the committee to convict, in its discretion (and to order disciplinary segregation), on the basis of any proof at all, so long as the disciplinary action is 'based upon more than mere silence.'" (Pet'r Br. at 41.)

The State's Attorney General in these proceedings has interpreted the regulation to require a finding based on substantial evidence of misconduct as a prerequisite to punishment by way of solitary confinement, as did the Ninth Circuit. Surely prisoners reading the regula-

tions could not be expected to put a finer gloss on them. Consequently, the regulations give prisoners a "reasonable expectation" that they will not be punished with disciplinary segregation absent a determination on "substantial evidence" of misconduct.

2. The Substantive Predicate Is a Finding Of Guilt Based on Evidence of a Specific Rule Violation.

Even if Petitioner's reading of the provision in question were correct, and Hawaii regulations did not mandate freedom from disciplinary segregation absent substantial evidence of guilt, the court of appeals correctly found that under the Thompson test the State of Hawaii created a protected liberty interest by placing substantive limitations on official discretion. Even if the burden of proof is not "substantial evidence," the regulations in any event mandate that punishment for serious misconduct, such as segregation for longer than four hours, must be based on evidence, other than the prisoner's silence in the face of the charges. While the

regulations provide that silence in face of the charge of misconduct "may be used as a permissible inference of guilt," Haw. Admin. R. § 17-201-17(c), disciplinary action "shall be based upon more than mere silence." Haw. Admin. R. § 17-201-18(b). See also Haw. Admin. R. §17-201-17 (b)(2). Petitioner characterizes this as the "most minimal of requirements," (Pet'r Br. at 41), but the fact remains that it is a requirement of evidence. In the absence of such evidence, a finding of serious misconduct and punishment by way of disciplinary segregation is precluded. It is this limitation on official discretion, and not any particular "burden of proof," that constitutes the "substantive predicate" of the liberty interest. The issue of whether "substantial evidence" is mandated as the exclusive standard for determinations of guilt is a red herring.

Hawaii's regulations treat determinations of, and punishment for, serious misconduct, in a manner fundamentally unlike other administrative

actions in the day-to-day running of the prison, such as classification and placement in a facility (Haw. Admin. R. § 17-201-1), transfers within or without the facility (Haw. Admin. R. § 17-201-22), administrative segregation (Haw. Admin. R. § 17-201-22), and involuntary protective custody (Haw. Admin. R. § 17-201-23), even though these actions may as a practical matter substantially curtail a prisoner's liberty.

In administrative matters, Hawaii's regulations prescribe no limits on official action; they leave prison officials to make their decisions based entirely upon subjective considerations and administrative convenience. Administrative segregation, which the regulations characterize as "nonpunitive in nature," Haw. Admin. R. § 17-201-24, may be imposed "whenever the facility administrator or a designated representative determines that an inmate or ward has committed or threatens to commit a serious infraction[,]" or that the inmate is a "threat"

to life or limb, the security or good governance of the facility or the community, or "whenever any similarly justifiable reasons exist." Haw. Admin. R. § 17-201-22. No standards or procedures are prescribed, other than the provision that "within a reasonable period of time," the inmate "should" be given a written summary of the reasons for administrative segregation, and "an opportunity to present evidence in defense[,]" but only "when permitting the inmate or ward to do so will not be unduly hazardous to institutional safety or correctional goals." Haw. Admin. R. § 17-201-24.

In contrast, the regulations relating to determinations of and punishment for misconduct dictate that decisions be made upon consideration of case-specific evidence and findings based on that evidence. Thus, the regulations provide that serious misconduct, which subjects the inmate to serious penalties such as segregation for longer than four hours, "shall be punished through the adjustment committee pursuant

to the procedures in sections 17-201-13 to 17-201-20." Haw. Admin. R. §17-201-12. A plea of not guilty to charges of serious misconduct "necessitates the consideration of evidence against the inmate or ward." Haw. Admin. R. § 17-201-17(b)(2). A finding of guilt "shall be made" where the inmate admits the violation or pleads guilty, or the charge is supported by substantial evidence, and disciplinary action "shall be based upon more than mere silence." Haw. Admin. R. § 17-201-18(b).[10]

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[10] A determination of guilt of a rule infraction, like a parole revocation decision, involves "a wholly retrospective factual question[.]" Morrisey v. Brewer, 408 U.S. 471, 479 (1972). A decision to confine a prisoner in administrative segregation, on the other hand, like a prison transfer or a parole release decision, depends on "purely subjective appraisals" or "informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate;" in these circumstances, "there is no set of facts which, if shown, mandate a decision favorable to the individual." See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 441 U.S. 1, 10 (1979) (quoting Meachum, 437 U.S. at 235). In Hawaii, as in all other jurisdictions, a determination of guilt of a specific rule violation involving serious misconduct cannot involve "purely subjective appraisals" or "informed predictions as to what would best serve

This is "relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." Thompson, 490 U.S. at 463 n.4. This language, which is compulsory in character, requires prison officials, before punishing an inmate for serious misconduct by solitary confinement, to consider evidence and make a finding of guilt based on the evidence. A prisoner can reasonably expect that he will not be placed in disciplinary segregation for more than four hours absent a finding of guilt of misconduct based on the evidence.

In addition, the rules specify a number of procedural safeguards in language unmistakably mandatory in character. The inmate "shall be served with written notice" of the hearing," including notice of the specific charges, and

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correctional purposes." Rather, such determinations involve a hearing in which a set of facts may be shown which would "mandate a decision favorable to the individual."

"shall have the opportunity to review all relevant non-confidential reports [of] misconduct or a summary of the details thereof" prior to the hearing Haw. Admin. R. § 17-201-17(c). At the hearing, the committee "shall explain the reason for the hearing and the nature of the charge or charges," Haw. Admin. R. § 17-201-17(b), and the inmate "shall be given an opportunity to respond to the evidence," explain the alleged misconduct, or offer evidence in mitigation. Haw. Admin. R. § 17-201-17(f). The inmate "has a right to be apprised of the findings of the adjustment committee, Haw. Admin. R. § 17-201-18(a), and the inmate "shall be given a brief written summary of the committee's findings which shall be entered in the case file." The findings "will briefly set forth the evidence relied upon and the reasons for the action taken." If "necessitated by personal or institutional safety and goals," the findings may exclude certain items of evidence, but in that case "the fact that evidence has been omitted

and the reason or reasons therefor must be set forth in the findings." Haw. Admin. R. § 17-201-18(c). These provisions supply an additional "substantive predicate," precluding a determination of guilt and punishment unless certain procedures are followed in considering that evidence, procedures which are required in language comparably "mandatory" to the language under consideration in Hewitt. See 459 U.S. at 470 n.6. These rules give rise to a reasonable expectation on the part of inmates that they are enforceable against prison officials, and that a determination of and punishment for serious misconduct will be made only in conformity with them.

C. The Facility Administrator's Discretion to Review and Modify Committee Findings and Decisions Does Not Prevent the Creation of a Liberty Interest

Petitioner also asserts that no liberty interest is created by the limits these regulations place on the adjustment committee because the regulations grant the facility administrator

the discretion, under Haw. Admin. R. § 17-201-20(b), to review and modify adjustment committee findings or decisions. (Pet'r Br. at 41-43.) Petitioner argues that the regulation leaves the facility administrator with "unfettered discretion" to overturn committee decisions to dismiss misconduct charges. Committee decisions are thus only "advisory"; and "therefore an inmate can have no expectation of 'acquittal' if there is neither 'substantial evidence' of misconduct nor a confession." Id. Petitioner argues that, accordingly, this case is "on all fours with Olim v. Wakinekona, 461 U.S. 238 (1983)." (Pet'r Br. at 42.)

This is a strained reading of the regulations themselves, and of the Court's decisions that mandatory language placing substantive limitations on official discretion create a liberty interest. The committee's function is not a merely "advisory" one under the regulations. The regulations provide that serious misconduct "shall be punished through the ad-

justment committee pursuant to the procedures in sections 17-201-13 to 17-201-20." Haw. Admin. R. § 17-201-12. It is the committee that is authorized to function as the primary fact-finding and sentencing body; the administrator has no authority to make determinations of guilt or punishment in the first instance, but is empowered only to review and modify. Haw. Admin. R. § 17-201-20(b).

The regulatory framework in this case is thus entirely different from the one under consideration in Olim. In Olim, the Court explicitly found that the disciplinary committee made "recommendations to the Administrator, who then decides what action to take." Olim, 461 U.S. at 242. Nothing in the Hawaii regulation suggests that the committee's findings are merely "recommendations", or that the facility administrator, in exercising discretion to review and modify committee findings and decisions, is freed from the limits placed on the committee's authority to make determination of

guilt and punishment. Indeed, the facility administrator can hardly be considered the decisionmaker since in this case his review took place over eight months after the Adjustment Committee issued its disposition of the charges and over seven months after Conner had completed the disciplinary segregation ordered by the committee. In contrast, in Olim, the prisoner was not transferred until after the Administrator reached a decision, which was consistent with a procedure calling for decisions to be made by the Administrator after a recommendation by the Committee.

III. THE COURT SHOULD NOT DISTURB THE LAW REGARDING STATE-CREATED LIBERTY INTERESTS

Amicus Curiae Criminal Justice Legal Foundation (CJLF) urges this Court to jettison "the whole notion of state-created liberty interests" in connection with arbitrary punishment. (CJLF

Amicus Brief at 14.)[11] This radical suggestion,

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[11] The Amicus Brief of the Criminal Justice Legal Foundation states that "excessive prisoner litigation detracts from the ability of the state to properly punish crime and protect the law abiding public." (CJLF Amicus Br. at 2). CJLF claims that "Prisoner civil rights cases filed in federal courts by state prisoners multiplied fivefold in 16 years, a much faster increase than the growth of the prison population." Br. at 2. CJLF cites to the U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Statistics 1993, pp. 550, 600. There are at least three problems with this claim. First, the cited source includes data on court filings from 1977 through 1993 (a sixteen year period), but includes population data only through 1992. Id. at 600. Second, CJLF's claim relates to petitions filed by state prisoners, id. at 550, while the population data cited refer to state and federal prisoners, id. at 600. Finally, even the data cited do not support CJLF's conclusion: state prisoners filed 78,752 civil rights petitions in federal court in 1977 and 33,018 petitions in 1993, reflecting a 4.26 times increase, rather than a fivefold increase. Id. at 550.

If one corrects for these problems, it transpires that in the last fifteen years the increase in civil rights filings has not significantly outpaced the increase in the prison population and, indeed, in the last ten years, there has actually been a per capita decrease in civil rights filings. State and federal prisoner filed 8,235 civil rights petitions in federal court in 1977; and 30,556 petitions in 1992, reflecting a 3.7 fold increase. Id. at 550. Over the same time period, the number of state and federal sentenced prisoners grew from 278,141 in 1977 to 847,271 in 1992, reflecting a threefold

if adopted, would unsettle the law and result in a flood of new litigation. In the twenty years since Wolff, all prison systems have developed procedures for compliance with Wolff with regard to the imposition of disciplinary segregation; an extensive body of case law has been developed in the lower courts, evaluating the adequacy of those procedures under Wolff. There is neither necessity nor justification for throwing that extensive framework of state law, regulation and judicial precedent into uncertainty.

Amicus CJLF concedes that, under Wolff, prisoners have a liberty interest in not being deprived of good-time credits without due process protection. (See CJLF Amicus Br. at 15.) Many jurisdictions, however, like Nebraska in Wolff, have but one system for the imposition of

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increase. Id. at 600. In the last ten years, civil rights filings increased from 17,575 in 1982 to 30,556 in 1992, reflecting a 1.7 fold increase. Id. at 550. During the same time period, the number of state and federal sentenced prisoners increased from 394,374 in 1982 to 847,271 in 1992, reflecting a 2.15 fold increase. Id. at 600.

punishment for serious prison misconduct, and the range of potential punishments includes both the loss of good time and the imposition of disciplinary segregation. A ruling by this Court that prisoners have a liberty interest in the retention of good-time credits, but not in the avoidance of disciplinary segregation, would confuse prison administrators and prisoners, and in the process generate an explosion of litigation.

The Amicus' primary rationale for overturning settled law regarding state-created liberty interests is an assertion that "the Due Process Clause must not be used to straitjacket efforts to protect inmates from each other." (CJLF Amicus Br. at 5.) Implicit in this argument is the premise that in order to maintain security prison administrators require arbitrary power to impose punishment. The history of American prisons demonstrates the fallacy of that claim. In fact, in the era when prison administrators had essentially untrammelled power, many prisons

were characterized by "rampant violence" as well as an utter "lack of professionalism on the part of security personnel." Hutto v. Finney, 437 U.S. 678, 687 (1978); see also Rhodes v. Chapman, 452 U.S. 337, 354-361 (1981) (Brennan, J., concurring).

Many observers have chronicled the effect of court intervention in promoting the development of a professional correctional staff. It is now the case that

> the operations of prisons and jails throughout the country are ... governed by an amalgam of statutes, regulations, and guidelines and are subject to greater accountability. Indeed, since the 1960's the principles of organizational rationality and legality have merged to structure the governance of the entire operational life of institutions and systems. One consequence is that the rule of law has not only penetrated these institutions; it has contributed to the professionalization of the administration of these institutions . . . . These changes far exceed the sum of the particulars in any set of court orders.

Malcolm M. Feeley & Roger A. Hanson, The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the

Literature, in Courts, Corrections and the Constitution 12, 26 (Di Iulio ed. 1990).

This "professionalization" of staff promotes rather than undermines a safe and orderly environment. While there have been some complaints of a short-term rise in violence while court reforms are being actively resisted by the old guard, the long-term results have been the promotion of safer and better-run prisons. See, e.g., Ben M. Crouch & James W. Marquart, Ruiz: Intervention and Emergent Order in Texas Prisons, in Courts, Corrections and the Consitution, supra 94-114. Indeed, the Federal Bureau of Prisons, which was among the first of the correctional systems to become "professionalized," has traditionally been considered one of the safest and most controlled. David Fogel, Let's Nationalize the State Prisons, in Prisoners and the Law 19-3, 19-6 (Robbins ed., 1972). Accordingly, there is no penal necessity for the radical change Amicus CJLF proposes.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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Margaret Winter
(Counsel of Record)
Elizabeth Alexander
Ayesha Khan
Alvin J. Bronstein
National Prison Project of the
American Civil Liberties Union
Foundation
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 234-4830

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, NY 10036

Carl Varady
American Civil Liberties Union
of Hawaii
P.O. Box 3410
Honolulu, Hawaii 96801